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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 674

JACUZZI BROS., INC.,
Petitioner,

vs.

LANDON, INC.,
Respondent.

INTERNATIONAL MANUFACTURING CO., INC., et al.,
Petitioners,

vs.

LANDON, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

FRANK A. NEAL,
1650 Russ Building,
San Francisco 4, California.
Counsel for Petitioners.

JAS. M. NAYLOR,
KARL A. LIMBACH,
1650 Russ Building,
San Francisco 4, California,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals

for the Ninth Circuit entered in the above-entitled cases on August 31, 1964, copies of said judgments being separately presented as Appendix A of the "Appendix to Petition for Writ of Certiorari."

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at ..... F.2d ..... and 142 USPQ 421, a copy of said opinion being separately presented as Appendix B of the "Appendix to Petition for Writ of Certiorari."

The opinions of the District Court and its findings of fact and conclusions of law are unreported. They are printed and separately presented in Appendix C. The judgments of the District Court are printed and separately presented in Appendix D.

JURISDICTION

The date of the judgments of the Court of Appeals was August 31, 1964, and the judgments were entered on August 31, 1964.

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a patent owner may mandatorily package-license his patents.

2. Whether patent owners may pool their patents for the purpose of having the holder of the pooled patents license them collectively and not otherwise.

3. Whether two patent owners may place their patents under the ownership of one of them with a contractual restriction which obliges the transferee-owner to license the patents collectively and not otherwise.

4. Whether mandatory package licensing of patents constitutes patent misuse irrespective of the relation to each other of the patents constituting the package.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article I, Section 8 of the Constitution of the United States provides:

> The Congress shall have Power * * * [Clause 8] [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The pertinent provisions of the United States Patent Code, Title 35 U.S.C., are as follows:

> Section 282. The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded:
>
> (1) Noninfringement, absence of liability for infringement or unenforceability.

The pertinent provisions, because of the public policy underlying them, of the United States Commerce and Trade Code, Title 15 U.S.C., are as follows:

> Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States * * * is declared to be illegal * * *.

STATEMENT

Landon, Inc. ("Landon") is the owner of United States Letters Patent No. 2,826,307 (Pace patent) and United States Letters Patent No. 2,844,255 (Cavenah patent). These patents cover filter devices which are adapted to form a part of the water recirculation systems of swimming pools.

The device of the Pace patent serves the function of drawing the surface water from a swimming pool and filtering that water.

The device of the Cavenah patent serves the function of drawing sub-surface water from a swimming pool and filtering that water. This device contains an attachment which when removed converts it to the device of the Pace patent.

Initially, Landon owned only one of these patents, the Cavenah patent. The Pace patent was then owned by Robert M. Pace. When the two patents were separately owned neither of the owners was able to obtain royalty-paying licensees, although devices embodying the inventions covered by the two patents were being made by swimming pool equipment manufacturers and were being widely sold to the swimming pool industry.

Landon and Robert M. Pace then entered into negotiations which resulted in an agreement providing, among

other things, for: the assignment of the Pace patent to Landon; the grant by Landon to Robert M. Pace of a royalty-free, non-exclusive license under both the Pace and the Cavenah patents; a covenant by Landon to put forth its best efforts to obtain licensees under the Pace and Cavenah patents at the most favorable royalty rate; and a covenant by Landon that it would license these two patents only collectively and never individually.

Such an agreement is still in force and effect. Under it and its ownership of both patents Landon was able to get all of the acknowledged leaders, except the Petitioners, of the swimming pool equipment industry into the fold as licensees under both patents. All of these acknowledged leaders, save one, had, as non-licensees, been engaged in making and selling the devices of the two patents prior to the Landon-Pace agreement.

The Court of Appeals recognized that Landon's licensing policy amounted to mandatory package licensing of the Pace and Cavenah patents. But, said the Court, such does not amount to misuse where, as here contended by the Court, the patents of the package are blocking in that they cover interdependent parts of one product. Were the patents non-blocking, the Court clearly indicates, the result would be different because of the evil of conditioning the grant of a license under one patent upon the acceptance of a license under one or more patents which the prospective licensee did not necessarily need.

The Court recognized that the Pace and Cavenah patents would not be blocking, or necessarily needed, if either of them was either invalid or not infringed by the

accused device made and sold by one or the other of the Petitioners. But, said the Court, each of such contingencies is merely hypothetical here because we have held each of the patents valid and each infringed by each of the accused devices.

In concluding that there was no misuse, the Court of Appeals purported to distinguish the situation here from that in *American Securit v. Shatterproof Glass Co.*, 3 Cir., 268 F.2d 769, by contending that in *Securit* there were involved competing rather than blocking patents. In making its unequivocal contention that the patents in *Securit* were competing, the Court below (1) said that the patents in *Securit* "could *possibly* be used independently without infringing one another" and (2) simply ignored the fact that both the trial court and the appellate court in *Securit*, as is expressly set forth in their reported decisions, did not consider or know of the relationship to each other of the patents involved and found misuse on the *per se* basis of the existence of a mandatory package licensing policy.

As to Jacuzzi Bros., Inc. v. Landon, Inc., the basis for federal jurisdiction in the court of first instance was afforded by the statute creating the remedy of declaratory judgments (28 U.S.C. Section 2201) and the jurisdictional provisions [28 U.S.C. Section 1331(a)] appertaining to civil actions for declaratory judgments of non-infringement and unenforceability of patents.

As to International Manufacturing Co., Inc. et al., v. Landon, Inc., the basis for federal jurisdiction in the court of first instance was afforded by the patent laws of the United States (35 U.S.C. Section 281) and the

jurisdictional provisions [28 U.S.C. Section 1338(a)] appertaining to civil actions for patent infringement.

REASONS FOR GRANTING THE WRIT

1. The United States Court of Appeals for the Ninth Circuit has decided an important question of federal law in a manner which defeats the policy of this Court of facilitating resistance to monopoly abuse and of striking down attempts to extend government-granted monopolies, i.e., patents and copyrights, by way of attempts to reinforce one such monopoly with another such monopoly, as by mandatorily package-licensing them, and in deciding this important question of federal law the Court below has failed to heed the reasoning underlying this Court's decisions, such as in *United States v. Paramount Pictures,* 334 U.S. 131, 156-159, and in *United States v. Loews, Inc.,* 371 U.S. 38, 47-48.

2. In holding that mandatory package-licensing of blocking, rather than competing, patents does not amount to patent misuse, the decision of the Court of Appeals below is in irreconcilable conflict with the decision of the Court of Appeals for the Third Circuit in *American Securit v. Shatterproof Glass Co.,* 268 F.2d 769, and this conflict calls for resolution to the end that the lower federal courts may be guided by a single and paramount line of decision concerning activities which impinge upon and affect the public interest and are within the realm of the public policy underlying the patent and the antitrust laws.

3. Any case where a lower court fails to follow, or in which there is reflected a failure upon the part of such a court to understand, the announced policy or rule of decision of this Court is one which requires review and correction to instill in lower courts the understanding that the powers vested in this Court under Article III of the Constitution as the highest appellate court necessarily create duties in the lower courts to follow the announced policies or rules of decision of this Court.

4. To permit to stand the holding of the Court of Appeals that mandatory package licensing of blocking patents is an acceptable practice will promote the following developments, all of which will be to the great disadvantage of proper concepts of proper monopolies and to healthy business competition in the free enterprise system of this country: the concept that the blocking patents of a package are either in reality or in effect integral parts of one overall patent or monopoly; the lower courts will develop a tendency, or pursue an effort, wherever possible, to hold that such patents are blocking rather than competing; to support a conclusion that such patents are blocking rather than competing the lower courts will strain to find infringement of all of the patents of the package; and to support a conclusion that such patents are blocking rather than competing the lower courts will strain to find that all the patents of the package are valid.

5. If the writ is not granted, the holding of no misuse by the Court of Appeals will seriously affect commerce by (1) furthering a predatory monopolistic practice which has had and continues to have a serious economic impact upon the public and the swimming pool equipment indus-

try and by (2) aiding and abetting the adoption of similar predatory monopolistic practices in all phases of industry and commerce wherein there is patent ownership and patent licensing. To permit the spread into other industries of the practice of mandatory package licensing of patents, whether this practice is purported to be justified under the guise that the patents are blocking or under some other guise, is to upgrade the value of multiple-patent ownership and to downgrade the value of the creation of individual inventions and the ownership of single patents in derogation of the constitutional concept of promoting the progress of science and useful arts.

6. It is vitally necessary to the public interest and the patent policy underlying Article I, Section 8, of the Constitution, that a prospective patent licensee have the right to pay royalty tribute to selected ones of a package of patents and be free to contest the validity of the other patents of the package. When, as here, the owners of a package of patents adopt the policy of cutting off that right of a prospective licensee, they thereby seek to obtain more than "the exclusive right to their respective * * * discoveries", as provided for by Article I, Section 8, of the Constitution. When a court, as here, has approved of the adoption of such a policy, it has done violence to the Constitution.

7. Assuming, arguendo, that one patent owner may engage in mandatory package licensing of his patents without misusing the exclusive right permitted by the Constitution to his respective discoveries, the concerted action of two patent owners in pooling their patents to create the package which is to be mandatorily licensed destroys

any justification for the adoption of the package licensing policy. When one patent owner attempts to monopolize by licensing together the legal monopolies afforded by his patents, it can be contended that he has engaged in no more than a restrictive licensing practice, but, when two patent owners join forces in such an attempt to monopolize, their action in concert violates the public policy underlying Section I of the Sherman Anti-Trust Act in that they have engaged in restrictive patent pooling.

CONCLUSION

It is respectfully submitted that, for the foregoing reasons, the granting of this petition is in order.

It is further submitted that it would be particularly timely to grant this petition because the questions it presents could then be considered by the Court along with the analogous and related questions presented by the petition for writ of certiorari in *Susser et al., v. Carvel Corporation et al.*, 2 Cir., No. 355, October Term, 1964, the latter petition having been granted by the Court on October 26, 1964.

Dated, San Francisco, California,
November 9, 1964.

Respectfully submitted,

FRANK A. NEAL,
Counsel for Petitioners.

JAS. M. NAYLOR,
KARL A. LIMBACH,
Of Counsel.